No. PD-0388-21

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
AT
AUSTIN, TEXAS

SILAS PARKER, Appellant	§
v.	§
THE STATE OF TEXAS, Appellee	§

On Appeal from Hays County in Case No. CR-18-0250 from the 274th Judicial District Court, the Hon. William R. Henry, Judge Presiding and the Opinion of the 3rd Court of Appeals in Case No. 03-19-00293-CR, Delivered the 22nd of April, 2021.

PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to TEX. R. APP. P. 68.4(a) the following is a complete list of the names of the parties and their counsel.

Party	**Counsel**
Appellate Panel	Chief Justice Byrne Justice Gisela Triana Justice Edward Smith
Trial Judge	The Hon. William R. Henry 274th Judicial District, Hays County
Silas Parker Defendant / Appellant	Mr. E. G. Morris & Ms. Angelica Cogliano 2202 Lake Austin Blvd, Austin, TX 78703
The State of Texas Prosecution / Appellee	Mr. Wes Mau, Hays County District Attorney's Office 712 South Stagecoach Trail, Suite 2057 San Marcos, Texas 78666

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STATEMENT REGARDING ORAL ARGUMENT

This case involves crucial issues of search and seizure under both Texas law and the United States Constitution. Appellant believes that oral argument would aid the Court in narrowing the issues and refining the arguments.

STATEMENT OF THE CASE

Silas Parker, Appellant, was charged by indictment for Possession of a Controlled Substance with Intent to Deliver in violation of Texas Penal Code § 481.113(e). The Defendant filed two motions to suppress.

The first Motion to Suppress Evidence was filed on September 19, 2018 (designated "First Motion to Suppress (House)"). CR at 8-9. In the First Motion to Suppress (House), Appellant requested the suppression of all evidence obtained pursuant to the search warrant issued on June 7th, 2017, allowing the search of and seizure of property from 2070 Lime Kiln Road in San Marcos, Texas (designated "First Search Warrant (House)"). *Id.* Appellant alleged that the First Search Warrant (House) was based on an affidavit (designated "First Affidavit (House)") containing statements made in reckless disregard for the truth; and that without those statements, the affidavit failed to establish probable cause to support the issuance of the warrant. *Id.*

The Second Motion to Suppress Evidence was also filed on September 19, 2018 (designated "Second Motion to Suppress (Phone)"). CR at 27-29. In the Second Motion to Suppress (Phone), Appellant requested the suppression of all evidence obtained pursuant to the search warrant issued on June 21st, 2017, allowing the search and seizure of all electronic consumer data relating to phone number 830-385-8137 (designated "Second Search Warrant (Phone)"). *Id.* In Paragraph 3, Appellant alleged that the Second Search Warrant (Phone) was based on an affidavit (designated "Second

Affidavit (Phone)") containing facts stemming from the illegal search and seizure conducted pursuant to First Search Warrant (House), and therefore constituted "fruit of the poisonous tree." *Id* at 28. In Paragraph 4, Appellant also alleged that the Second Affidavit (Phone) did not contain facts sufficient to constitute probable cause, but rather stated mere conclusory statements. *Id.*

A hearing on both Motions to Suppress was conducted on November 8, 2018. 2 RR 3. At that time, the State stipulated to excising portions of the affidavit as they were from sentences included in the affidavit in reckless disregard for the truth. 2 RR 7. After the hearing, and before the time of trial, the Trial Court determined the affidavits still established sufficient probable cause without the excised statements and denied both Motions to Suppress. 2 RR 23. Testimony was re-opened and supplemented with an addition stipulation from both parties on January 17, 2019. 3 RR 5. The Trial Court entered a Finding of Fact and Conclusions of Law on February 21, 2019. CR at 43. The defendant entered a plea of guilty to the lesser included offense of Possession of a Controlled Substance, a 3rd degree felony, on February 21, 2019. CR at 45. By agreement, the defendant did not waive the right to appeal the matters raised in the pretrial motions to suppress and ruled on by the Trial Court. CR at 53, 56. Sentence was imposed in open court and the defendant was placed on deferred adjudication community supervision on April 17, 2019. CR at 73-74.

STATEMENT OF PROCEDURAL HISTORY

The Third Court of Appeals issued an opinion on April 22, 2021, affirming the trial court's denial of Appellant's motions to suppress evidence. *Parker v. State, No.* 03-19-00293 (Tex. App. – Austin delivered April 22, 2021). Appellant filed a Motion for Extension of Time to File Petition for Discretionary Review with the Court of Criminal Appeals which was granted. The deadline was extended to July 5, 2021.

GROUNDS FOR REVIEW

ISSUE 1: Are all anticipatory search warrants are prohibited under Texas law?

ISSUE 2: Even if anticipatory search warrants can be issued for contraband under Article 18.01 (b), can they authorize the search for and seizure of mere evidence?

ISSUE 3: Can a warrant authorize the search for and seizure of mere evidence if it was not issued pursuant to the heightened standard of article 18.02(a)(10)?

ISSUE 4: If anticipatory search warrants are allowed under Texas law, was the triggering condition met in this case?

ISSUE 5: Was the search warrant for Mr. Parker's phone predicated on an affidavit containing mere conclusory statements and that lacked sufficient factual information to establish probable cause?

ISSUE 6: Was the search warrant for Mr. Parker's phone predicated on an affidavit containing fruit of the poisonous tree?

REASONS FOR GRANTING REVIEW

Review is necessary because The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court of Criminal Appeals' power of supervision. *See* Tex. R. App. P. 66.3(f).

STATEMENT OF THE FACTS

On June 1, 2017, a male subject entered a UPS facility in Eugene, Oregon and shipped two packages to 2070 Lime Kiln Road, San Marcos, Texas, and told the UPS employee that the packages contained chanterelle mushrooms. CR at 16. The shipping paperwork for both packages indicated they were shipped from "SilasParker" to "Silas Parker" care of "Scott Cove." *Id.* UPS employees contacted the Oregon State Police Department because they believed the packages smelled like marijuana. *Id.* Detective Jered Mclain met with the UPS employees and took custody of the parcels and paperwork. *Id.* Detective Mclain opened the parcels and found mushrooms which gave a positive result for Psilocybin. *Id* at 17. He did not locate any marijuana. *Id.*

On June 5, 2017, Detective Mclain contacted Detective Lee Harris of the San Marcos Police Department to coordinate a controlled delivery through UPS tothe San Marcos address. *Id.* Detective Harris used a law enforcement database to determine that a "Silas Graham Parker" had the 2070 Lime Kiln Road address listed on his Texas Driver's License. *Id.* On June 7, 2017, Detective Harris obtained a search warrant (First Search Warrant (House)) which was to be executed on the expected delivery date of June 9, 2017, after he could "confirm parcel delivery to said suspected place and premises." *Id.*

On the morning of June 9, 2017, Detective Harris and other officers from the San Marcos Police Department began conducting covert mobile surveillance of the

property. *2 RR 9*. The property of 2070 Line Kiln Road sits out of sight from the main roadway, so the law enforcement personnel watched for the arrival of a UPS truck and other individuals. *Id.* At 2:00pm, Detective Harris observed a UPS truck enter the property, at which point he used his phone to track the parcels on the UPS website. *Id.* After a few minutes, the UPS tracking technology indicated the parcelshad been "left at the front door". *Id.* At some point, Detective Harris knew an individual named Zachary Alfin had approached the delivery truck and took custody of the packages. *Id* at 9-101.

Detectives then entered the premises and conducted a search relying on the First Search Warrant (House). CR at 12. A number of items were seized during the search, including two bags of mushrooms and "affirmative links" to Silas Parker, all of which were listed on a property inventory form. *Id* at 13.

On June 21, 2017, Detective Harris obtained the Second Search Warrant (Phone) to secure Electronic Consumer Data relating to Silas Parker's phone number: 830-385-8137. *Id* at 30-35. The affidavit he swore to when requesting theSecond Search Warrant (Phone) contained information derived from the executionof the First Search Warrant (House). *Id* at 37. The Second Search Warrant (Phone) was executed, which resulted in the law enforcement agencies of Hays Countyobtaining location data showing the movement of the phone. 3 RR 5.

ARGUMENT

ISSUE 1: Are all anticipatory search warrants are prohibited under Texas law?

Article 18.01(b) of the Code of Criminal Procedure sets forth the conditions under which a search warrant may be issued. That article states that a search warrant may be issued only if there is a sworn affidavit setting forth facts sufficient to establish that "probable cause does in fact exist." Tex. Code Crim. Proc. Ann. Art. 18.01(b). An "anticipatory search warrant" is based on an affidavit asserting that probable cause will exist at some future time upon the occurrence of some condition precedent, or "triggering event." *See US v. Grubbs, 547 U.S. 90, 126 S. Ct. 1494, 164 L. Ed. 2d 195 (2006* While anticipatory search warrants are valid under federal law, see id, Texas law requires that items to be searched for or seized are at the designated location "at the time the search warrant is issued." *Davis v. State*, 202 S.W.3d 149, 155. (Tex. Crim. App. 2006). Therefore, Texas magistrates are precluded from issuing anticipatory search warrants under state law. *See Mahmoudi v. State,* 999 S.W.2d 69 (Tex. App. – Hous. 14th. 1999)

The two cases in Texas jurisprudence addressing whether the language of Texas Code of Criminal Procedure Article 18.01 prohibits anticipatory search warrants involved search warrants issued by federal magistrates. In the first, *State v. Toole*, the Court of Criminal Appeals acknowledged that the plain language of Article 18.01 does not provide for anticipatory search warrants, but declined to hold on the validity of

such search warrants because the federal magistrate who issued the warrant being challenged did not have to comply with state law. *State v. Toole,* 872 S.W.2d 750, 752 (Tex. Crim. App. 1994). However, the Court did point out that Article 18.01 is a "statute of prohibition rather than authorization… [which] prohibits Texas magistrates from issuing search warrants unless certain conditions exist." Id. In the second, *Mahmoudi v. State*, the 14th Court of Appeals also found that federal magistrates are not bound by the Texas Code of Criminal Procedure, but clearly stated that anticipatory search warrants do "not meet the requirements of Article 18.01." 999 S.W.2d at 72.

The Court of Appeals correctly determined that anticipatory search warrants are constitutional under the 4th Amendment of the United States Constitution, but that the Court of Criminal Appeals has not addressed this issue under Texas law. This Court should in this case, as it has repeatedly in the past, exercis its authority to construe language in the Texas Constitution to afford greater protections. *See, e.g., Richardson v. State*, 864 S.W.2d 944 (Tex. Crim. App. 1993) (holding that use of a "pen register" is a "search" under Article I, Section 9 of Texas Constitution); *Autran v. State*, 887 S.W.2d 31 (Tex. Crim. App. 1994) (providing greater protection for privacy rights in vehicle inventories than Fourth Amendment); *State v. Ibarra*, 953 S.W.2d 242 (Tex. Crim. App. 1997) (clear and convincing evidence required for consent in Texas rather than proof of voluntariness by only preponderance of evidence under Fourth Amendment). *See generally*, Reamey & Bubany, Texas Criminal Procedure 97, notes 1-2 (10th ed. 2010). As Professor Reamey put it in his article on Anticipatory Search Warrants in Texas:

> The glory and the danger of federalism is that a state's values may be expressed through its own laws. Those values are not defined entirely by a national compact. If the state believes its citizens are ill-protected by the rights guaranteed in the United States Constitution, it may afford its citizens additional protections. Accordingly, Texas procedural law in numerous ways limits the authority of law enforcement, ways that exceed the reach of the Bill of Rights to the federal constitution.
> Gerald S. Reamey, The Promise of Things to Come: Anticipatory Warrants in Texas, 65 Baylor L. Rev. 473 (2013)

In this case, the warrant was issued by a Hays County magistrate, and not a federal magistrate, and is therefore could not be issued unless the conditions provided for in the Code of Criminal Procedure were complied with. As stipulated to by the State, the parcels containing the Psilocybin were still in the custody of the United Parcel Service (UPS) at the time of the issuance of the warrant, and not at the residence to be searched as the affidavit suggests. 2 RR 7-8. Therefore, it is an anticipatory search warrant, which is prohibited by Article 18.01. Law enforcement had no exigent circumstances that would have prevented them from locking down the location and getting a search warrant – especially considering neither Mr. Parker nor Mr. Cove were present. This case is the perfect example of the dangers of anticipatory search warrants. An individual could simply put a recipient's name on both the destination address and return address on a box of contraband, and set that recipient up to unknowingly be subject to both a search of their home and criminal charges.

ISSUE 2: Even if anticipatory search warrants can be issued for contraband under Article 18.01(b), can they authorize the search for and seizure of mere evidence?

Article 18.01(c) of the Code of Criminal Procedure prohibits the issuance of a search warrant for items simply "constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense" unless the affidavit includes several additional requirements to those prescribed under Article 18.01(b). Specifically, the affidavit must set out facts to establish probable cause: "(1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched." Tex. Crim. Proc. Code Ann. Art. 18.01(c). These additional requirements plainly preclude the use of anticipatory search warrants for search for and seizure of non-contraband evidence.

First, under, Article 18.01(c) the affidavit for an evidentiary warrant must set forth probable cause "that a specific offense has been committed." Where a completed crime cannot be established until the "triggering event" of the anticipatory search warrant has occurred, the requirement of a specific offense having already been committed clearly has not been met. Second, Article 18.01(c) requires the affidavit include facts that show the evidence to be searched for is located at the location to be searched. This requirement on its face necessitates evidence presently at that location at the time the warrant is executed, thereby prohibiting a warrant based on the possibility of evidence being found at that location in the future.

Here, the affidavit and search warrant in question are clearly for evidentiary purposes. The affidavit itself alleges that it establishes probable cause to search for "personal property constituting evidence of a criminal offense or constituting evidence tending to show that a particular person committed a criminal offense," using exactly the language from Article 18.02(10) that triggers the heightened requirements of 18.01(c). CR at 14. Importantly, the State agreed to strike the language from the affidavit stating "that there is in Hays County, at a location, a certain drug" and the word "Psilocybin," thereby removing all language that would support a search warrant for contraband pursuant to Article 18.02(7). 2 RR 7. Additionally, both the affidavit and the search warrant list the items to be searched for and seized, including almost exclusively non-contraband items such as "papers, books, ledgers, journals, tally sheets, personal computers… [and] any proof of residency of a person at the suspected place and premises." CR at 10 & 15.

ISSUE 3: Can a warrant authorize the search for and seizure of mere evidence if it was not issued pursuant to the heightened standard of article 18.02(a)(10)?

The Court of Appeals correctly pointed out that the 14th Court of Appeals has held, and some other appellate courts have followed, that a warrant that authorizes a search for items described by article 18.02(a)(10) and items listed under another ground is not subject to article 18.01(c). *Jennings v. State*, 531 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd). However, this Court has not weighed in on the

issue.[1] This is the perfect case to address if and how a search warrant meeting only the requirements for contraband under 18.02(a)(7) can authorize a search for mere evidence when the mere evidence is not in plain view during the warrant's execution. In this case, there was definitively no probable cause of Mr. Parker committing a crime because he was out of state at the time the warrant was issued and they had not even determined he was the individual who sent the package. Upholding this ruling will, again, allow the search of an unsuspecting citizen's home – their entire home – and the seizure of their non-contraband possessions upon the delivery of contraband to their home by someone entirely different.

ISSUE 4: If anticipatory search warrants are allowed under Texas law, was the triggering condition met in this case?

Even when anticipatory search warrants are valid, failure to comply with the triggering event voids the warrant. *U.S. v. Perkins*, 887 F.3d 272, 275 (6th Cir. 2018); see also *Grubbs*, 547 U.S. at 100–01, (Souter, J., concurring in part and concurring in the judgment) ("[I]f an officer ... makes the ostensibly authorized search before the unstated condition has been met, the search will be held unreasonable.") Here, the triggering event for the Search Warrant was "confirm[ation of] parcel delivery to said suspected place and premises." CR at 17. The affidavit and warrant described the "suspected place

[1] Just last year, this Court acknowledged its lack of jurisprudence on this issue by declining to review it only because it wasn't raised in the petition. *Foreman v. State*, 613 S.W.3d 160, 165 (Tex. Crim. App. 2020), reh'g denied (Jan. 13, 2021), cert. denied, No. 20-1445, 2021 WL 1951874 (U.S. May 17, 2021)

and premises" as "2070 Lime Kiln Road in San Marcos, Hays County, Texas," and stated that said premises was in charge of and controlled by "suspected party" Silas Parker. CR at 14 & 10.

If anticipatory search warrants are valid under Texas Law, the warrant in this case would require an actual delivery to the premises in order to become valid. When the triggering event is delivery to a particular premises, the package must be "taken by someone inside" or "deliver[ed] to someone who had just been inside the house." *U.S. v. Miggins*, 302 F.3d 384 (6th Cir. 2002); see also *U.S. v. Perkins*, 887 F.3d 272 (6th Cir. 2018). At the very least, there need be a "nexus between the package and the residence to which it was destined for delivery," which is not established simply by leaving the package at the entrance of a suspected premises without more. *U.S. v. Barnes*, 95 F.3d 1148 (5th Cir. 1996) (finding a sufficient delivery for a triggering event where the package was addressed to the house, a note bearing the name of the addressee was left on the house instructing that the package be left at the door, and someone identifying himself as the addressee made a phone call demanding that the package be left at the house).

Here, the triggering "delivery" of the package to the "suspected premises" was insufficient and therefore the search warrant was void. It is true, as is stated in the Trial Court's Finding of Fact and Conclusions of Law, that the addressee of the package was Silas Parker, and Silas Parker's driver's license listed the same address as the shipping address. CR at 41. However, neither in the record nor in the Finding of Fact by the

Trial Court was there ever a sufficient nexus between the package and the residence to establish the delivery as having occurred. The extent of the "delivery" was UPS indicating that the package was "left at the front door" and Detective Harris stating in his offense report that "it was Zachary Alfin that approached the UPS delivery truck and took custody of the two packages." 2 RR 9-10. There is no clarification of what "left at the front door" signified, nor is there any description of where Zachary Alfin came from, where he took the package to, or how he is connected to Silas Parker or the residence at all. Therefore, the search warrant was void when executed, and the evidence obtained should have been suppressed.

If this Court determines that anticipatory search warrants are valid under Texas law for both contraband and mere evidence, and that a contraband warrant can authorize the search and seizure of mere evidence, then it is important to clearly define and limit the curtailment of Fourth Amendment protections. Allowing anticipatory search warrants to authorize the search of a home when nobody at that home knowingly took possession of contraband, there was no other evidence of contraband in the home, and the individual to whom the package is addressed is not even in the state is an absurd result.

ISSUE 5: Was the search warrant for Mr. Parker's phone predicated on an affidavit containing mere conclusory statements and that lacked sufficient factual information to establish probable cause?

Neither federal nor Texas law defines precisely what degree of probability suffices to establish probable cause, but that probability cannot be based on mere conclusory statements of an affiant's belief. *Johnson v. State*, 803 S.W.2d 272 (Tex. Crim. App. 1990), overruled on other grounds by *Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991). An affiant must present an affidavit that allows the magistrate to independently determine probable cause and the magistrate's "action[s] cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Further, regarding the description of the facts and circumstances that give rise to a probable cause determination, conclusory statements by the affiant are legally insufficient. *Barnes v. Texas*, 380 U.S. 253 (1965). Rather, the affiant must describe the facts and circumstances that comprise the probable cause, so that a magistrate may independently evaluate the existence or nonexistence of sufficient facts to justify issuance of the warrant. Id. Merely listing the affiant's conclusions, without describing the facts and circumstances that lead to the affiant's conclusions, is legally insufficient. Id.

Referring to conclusory statements and "bare-bones" affidavits, the United States Supreme Court noted in Gates that, "In order to ensure that . . . an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued." *Gates*, 462 U.S. at 239. Thus, a mere conclusory statement will not suffice for a showing of probable cause. *Serrano v. State*, 123 S.W.3d 53, 59 (Tex. App.—Austin 2003, pet. ref'd).

The Second Affidavit (Phone) is riddled with conclusory statements on the part of Affiant. In paragraph 2, Affiant states: "The parcels were shipped from Eugene, Oregon via UPS to the above mentioned address with the name "Silas Parker" as both the sender and the recipient, "care of" Scott Cove. The package was initially intercepted by Oregon State Police and determined to contain approximately 40 pounds of psilocybin." CR at 37. There is no information provided about how Affiant knows the package was shipped from Eugene Oregon, if Affiant was in contact with at the Oregon State Police Department, or how Affiant came to know any of these assertions.[2] The Affiant claims the package "was determined to contain" psilocybin, id., "without detailing any of the 'underlying circumstances' upon which that belief is based." *State v. Jordan,* 342 S.W.3d 565, 569 n. 8 (Tex. Crim. App. 2011) (quoting *U.S. v. Ventresca*, 380 U.S. 102 (1965)). All of the claims in paragraph 2 are conclusory statements.

In paragraph 3, Affiant states: "Silas Parker (DOB: 08/04/83) was determined to have a TXDL with an address of 2070 Lime Kiln Road, San Marcos, Texas. Silas Parker was not on scene at the time of the search warrant; an associate of Parker stated he was out of town." CR at 37. Again, in a purely conclusory statement, the affiant fails to establish how it was determined that Silas Parker had a driver's license, or what address was listed on that license. Additionally, the affiant claims that "an associate" stated that Mr. Parker was not at the location, without any attempt at identifying the

[2] Compare, for example, the facts set out by the Affiant in the affidavit for Search Warrant 1 (House) which detailed all of this information. (RR 16)

person providing that information or how they knew what they were saying. "An affidavit that fails to state when the affiant received the information from the informer, when the informer obtained the information, or when the described conduct took place is insufficient to support issuance of a search warrant." *State v. Davila*, 169 S.W.3d 735, 739 (Tex. App.—Austin 2005, no pet.).

Paragraph 5 states: "During execution of the search and arrest warrant, it was determined that Silas Parker resides at 2070 Lime Kiln Road, San Marcos, Texas, which is the same address listed on the two parcel's shipping labels that contained the psilocybin; this was determined not only by Parker's TXDL but by the affirmative link(s) located within the residence." CR at 37. Again, Affiant failed to back up the conclusions about Mr. Parker's diver's license with facts about how that information came to be established. Additionally, Affiant relies on "affirmative link(s)" without any description of these links, where they were found, or even if there were more than one single "link."[3]

[3] The term "affirmative link" is most often used when evaluating circumstantial evidence of possession, and the factors used there exemplify the facts that could have been, but were not used to establish any foundation for the Affiant's conclusion that the affirmative links found by the search of Mr. Parker's home established his residence. "Courts have recognized as many as seventeen nonexclusive factors that may be considered when evaluating affirmative links. The factors include (1) whether the contraband was in plain view or recovered from an enclosed place; (2) whether the accused was the owner of the premises or had the right to possess the place where the contraband was found, or was the owner or driver of the automobile in which the contraband was found; (3) whether the accused was found with a large amount of cash; (4) whether the contraband was conveniently accessible to the accused or found on the same side of the vehicle as the accused was sitting; (5) whether the contraband was found in close proximity to the accused; (6) whether a strong residual odor of the contraband was present; (7) whether the accused possessed other contraband when arrested; (8) whether paraphernalia to use the contraband was in view or found on the accused; (9) whether the physical condition of the accused indicated recent consumption of the

Finally, paragraph 7 states: "Affiant knows via training and experience that the data sought is held in electronic storage by the mobile cellular carrier." (RR 37). A conclusory statement relying on an affiant's "training and experience" must include information about that training and experience. *State v. Elrod,* 395 S.W.3d 869, 881-882 (Tex. App.—Austin 2013, no pet.) (Holding that Magistrate did not have substantial basis for determining that probable cause existed to search residence where affidavit lacked information regarding detective's training and experience, his general knowledge of child abuse crimes, or his familiarity with injuries sustained in such crimes based on his training and experience.)

The search warrant is deficient because it is replete with mere conclusory statements. Said conclusory statements do not suffice for a showing of probable cause and cannot provide a legal basis for the execution of a search of someone's private residence in contravention of Amend. XIV, U.S. Const. and Texas Const. Article 1 Section 9.

ISSUE 6: Was the search warrant for Mr. Parker's phone predicated on an affidavit containing fruit of the poisonous tree?

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contraband in question; (10) whether conduct by the accused indicated a consciousness of guilt; (11) whether the accused attempted to escape or flee; (12) whether the accused made furtive gestures; (13) whether the accused had a special connection to the contraband; (14) whether the occupants of the premises gave conflicting statements about relevant matters; (15) whether the accused made incriminating statements connecting himself to the contraband; (16) the quantity of the contraband; and (17) whether the accused was observed in a suspicious place under suspicious circumstances. *Thomas v. State*, 12-06-00080-CR, 2007 WL 2460073, at *5 (Tex. App.—Tyler Aug. 31, 2007, no pet.) (citing, e.g., *Willis v. State*, 192 S.W.3d 585, 593 (Tex.App.-Tyler 2006, pet. ref'd)).

Evidence must be suppressed when it was obtained "obtained either during or as a direct result of" Fourth Amendment violation. *Wong Sun v. U.S.*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). This "fruit of the poisonous tree" doctrine serves to exclude as evidence not only the direct products of an illegal search, but also indirect products. *State v. Iduarte,* 268 S.W.3d 544, 550-551 (Tex. Crim. App. 2008). Therefore, evidence obtained as a result of an illegal search cannot then be used as the bases for a subsequent search. *See Elro*d, 395 S.W.3d at 882.

The statements made in the Second Affidavit (Phone) for the Second Search Warrant (Phone), and the "verified facts" contained therein, are based on the illegal search and seizure pursuant to the First Search Warrant (House). CR at 37. Paragraph 1 and 5 of the Second Affidavit (Phone) sets out on its face that it was based on information and evidence obtained "[d]uring execution of the" First Search Warrant (House). CR at 37. The First Search Warrant was deficient for the reasons set forth in Issues 1-3 above, and so conducted in violation of the Fourth and Fourteenth Amendments of the United States Constitution, Article 1, Sec 9 of the Texas Constitution, and Articles, 18.01 and 18.02 Texas Code of Criminal Procedure. All of the evidence obtained pursuant the Second Search Warrant (Phone) is therefore "fruit of the poisonous tree."

PRAYER FOR RELIEF

Appellant Silas Parker prays that the Court will grant discretionary review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on July 5, 2021, a copy of this brief was served viaState e-filing service to Stacey Soule, the State Prosecuting Attorney, at information@spa.texas.gov.

/s/ Angelica Cogliano
Angelica Cogliano

CERTIFICATE OF COMPLIANCE

I certify the foregoing Petition for Discretionary Review complies with Rule 9.4(i)(2)(D) of the Texas Rules of Appellate Procedure. This

document is 4229 words long. I have relied upon the word count function of Microsoft Word, which is the computer program used to prepare this document, in making this representation.

/s/ Angelica Cogliano
Angelica Cogliano

APPENDIX

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-19-00293-CR

Silas Graham Parker, Appellant

v.

The State of Texas, Appellee

FROM THE 274TH DISTRICT COURT OF HAYS COUNTY
NO. CR-18-0250, THE HONORABLE WILLIAM R. HENRY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

Silas Graham Parker was charged with possession with intent to deliver four hundred grams or more of a controlled substance, psilocin. *See* Tex. Health & Safety Code § 481.113(a), (e). Pursuant to a plea-bargain agreement, appellant pled guilty to the lesser-included offense of possession of one gram or more but less than four grams. *See id.* § 481.113(c). The district court placed him on deferred-adjudication community supervision for ten years. On appeal, appellant challenges the denial of his two pretrial motions to suppress. We affirm.

BACKGROUND[1]

On June 1, 2017, Detective Lee Harris of the San Marcos Police Department received information about the seizure of two packages by the Oregon State Police. Detective Jered McLain of the Oregon State Police explained to Detective Harris that a security supervisor at a UPS store in Eugene, Oregon, opened a package, one of two that he thought smelled of marijuana, prior to shipment. Detective McLain, a member of the Lane County Interagency Narcotics Enforcement Team, recognized the contents as psilocybin mushrooms. He seized both packages and opened the second package. Each package contained twenty, one-pound bags of mushrooms, which tested positive for psilocybin.[2] The shipping labels and paperwork listed Silas Parker as both the shipper and the recipient, with a delivery address of 2070 Lime Kiln Road, San Marcos, Texas. At Detective Harris's request, Detective McLain returned one bag to each package, added rocks for weight, and returned them to the UPS store for shipment. The UPS supervisor provided Detective Harris with the packages' tracking information, which reflected a delivery scheduled for June 9, 2017. Detective Harris searched a law enforcement database and discovered that the address on appellant's driver's license is 2070 Lime Kiln Road. He also discovered that appellant is listed on the website of Thigh High Gardens, a business at the same address, as its "manager."

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[1] The trial court conducted evidentiary hearings on the motions. Although no witnesses testified, the State offered two exhibits, which contained the warrants, supporting affidavits, and returns. In addition, at the first hearing, the parties stipulated to the admission of portions of the offense report, which were read aloud to the court. At the second hearing, the parties stipulated to the fact that the second search warrant was executed. We take the facts in the background section from two supporting affidavits and the stipulations.

[2] The parties treat psilocybin as interchangeable with psilocin. We note that both compounds are listed separately as controlled substances. *See* Tex. Health & Safety Code § 481.103(a)(5)(B)(ii).

Detective Harris submitted an affidavit requesting a warrant to arrest appellant and seize the packages on the expected delivery date after confirming that the packages had been delivered. The affidavit describes the land at 2070 Lime Kiln Road and its improvements, which are not visible from the front gate. A magistrate judge issued the warrant. On the morning of June 9, 2017, Detective Harris and other officers watched the delivery truck drive through the property's front gate and out of sight. After Detective Harris confirmed on the UPS website that the driver had marked the packages as "delivered," the officers executed the warrant and seized the bags of mushrooms, among other things.

Detective Harris subsequently applied for a second warrant to obtain Parker's electronic customer data from his cellular provider. The affidavit supporting the request describes the previous events in the case and explains that the customer data could confirm that appellant was in Oregon when the packages were shipped. A different magistrate granted the second warrant, which was executed on the cellular provider.

Appellant filed a motion to suppress all evidence from the search of 2070 Lime Kiln Road and a separate motion to suppress his electronic customer data. The district court heard arguments, admitted copies of the warrants and Detective Harris's affidavits, and overruled both motions. Appellant pleaded guilty, and the district court placed him on deferred-adjudication community supervision for ten years. This appeal followed.

DISCUSSION

Appellant argues on appeal that the first warrant is an invalid "anticipatory" warrant and, in the alternative, that Detective Harris failed to comply with its terms. He also contends that there was no probable cause to support either warrant.

Legal Standards

We review a trial court's ruling on a motion to suppress evidence for an abuse of discretion, applying a bifurcated standard of review. *State v. Cortez*, 543 S.W.3d 198, 203 (Tex. Crim. App. 2018). We afford almost total deference to the trial court's findings of historical fact and determinations of mixed questions of law and fact that turn on credibility and demeanor if they are reasonably supported by the record. *State v. Arellano*, 600 S.W.3d 53, 57 (Tex. Crim. App. 2020). We review de novo a trial court's determination of legal questions and its application of the law to facts that do not turn upon a determination of witness credibility and demeanor. *Id.*

The issues raised here include statutory construction, which is a question of law that we review de novo. *Lopez v. State*, 600 S.W.3d 43, 45 (Tex. Crim. App. 2020). In analyzing a statute, we apply the "the plain meaning of its language, unless the statute is ambiguous, or the plain meaning would lead to absurd results that the legislature could not have possibly intended." *Liverman v. State*, 470 S.W.3d 831, 836 (Tex. Crim. App. 2015).

Analysis

"The cornerstone of the Fourth Amendment and its Texas equivalent is that a magistrate shall not issue a search warrant without first finding probable cause that a particular item will be found in a particular location." *Foreman v. State*, 613 S.W.3d 160, 163 (Tex. Crim. App. 2020) (citing *Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007)). Under article 18.01 of the Code of Criminal Procedure, a search warrant may issue only after submission of an affidavit "setting forth substantial facts establishing probable cause." Tex. Code Crim. Proc. art. 18.01(b). "Probable cause exists when, under the totality of the

circumstances, there is a 'fair probability' that contraband or evidence of a crime will be found at the specified location." *State v. Elrod*, 538 S.W.3d 551, 558 (Tex. Crim. App. 2017) (citing *State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012)). This is a "flexible and nondemanding" standard. *Foreman*, 613 S.W.3d at 164.

Appellant first argues that the warrant authorizing the search of 2070 Lime Kiln Road is an "anticipatory warrant" that is not supported by probable cause. An anticipatory search warrant is "a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place." *United States v. Grubbs*, 547 U.S. 90, 94 (2006) (citing 2 W. LaFave, Search and Seizure § 3.7(c), 398 (4th ed. 2004)). Most anticipatory warrants "subject their execution to some condition precedent other than the mere passage of time—a so-called 'triggering condition.'" *Id.* The affidavit here, for example, explained that the search would take place "on or around the expected delivery date of June 9, 2017, after [Harris] has been able to confirm parcel delivery to said suspected place and premises." Appellant argues that article 18.01(b) prohibits magistrates from issuing anticipatory search warrants. We disagree.

Article 18.01(b) provides:

> No search warrant shall issue for any purpose in this state unless sufficient facts are first presented to satisfy the issuing magistrate that *probable cause does in fact exist for its issuance.* A sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested.

Tex. Code Crim. Proc. art. 18.01(b) (emphasis added). Appellant argues that article 18.01(b) prohibits anticipatory warrants because probable cause does not "exist" at the time of issuance. The Court of Criminal Appeals has not addressed this issue under article 18.01, but the United

States Supreme Court has rejected this argument under the Fourth Amendment.[3] *See* U.S. Const. amend IV (providing that "no warrants shall issue, but upon probable cause"). The Court explained:

> Because the probable-cause requirement looks to whether evidence will be found when the search is conducted, all warrants are, in a sense, "anticipatory." In the typical case where the police seek permission to search a house for an item they believe is already located there, the magistrate's determination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed. . . . . Thus, when an anticipatory warrant is issued, the fact that the contraband is not presently located at the place described in the warrant is immaterial, so long as there is probable cause to believe that it will be there when the search warrant is executed.
>
> Anticipatory warrants are, therefore, no different in principle from ordinary warrants. They require the magistrate to determine (1) that it is *now probable* that (2) contraband, evidence of a crime, or a fugitive *will* be on the described premises (3) when the warrant is executed.

Grubbs, 547 U.S. at 95–96 (internal citations and footnote omitted). For probable cause to exist at the time the warrant issues, "[i]t must be true not only that if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place, but also that there is probable cause to believe the triggering condition will occur." *Id.* at 96–97 (internal citation omitted). Appellant argues that article 18.01(b) prohibits magistrates from issuing warrants based on such conditional facts, but when the Legislature intends to prohibit magistrates from issuing warrants unless the affidavit includes a certain type of facts, it does so expressly. *See, e.g.*, Tex. Code Crim. Proc. arts. 18.01(c) (providing that search warrants

[3] We disagree with appellant that the Court of Criminal Appeals adopted his interpretation of article 18.01(b) in *State v. Toone*, 872 S.W.2d 750 (Tex. Crim. App. 1994). The Court declined to reach that issue and decided the case on other grounds. *See id.* at 752 ("We emphasize that our holding in this case does not reflect upon the validity of an anticipatory search warrant under the Texas Constitution, nor does it reflect upon the validity of an anticipatory search warrant which is otherwise governed by article 18.01.").

for evidence of crimes may not issue unless affidavit includes certain facts), .0215 (prohibiting magistrates from issuing warrants to search cellular telephones unless affidavit includes certain facts). Article 18.01(b) says only that the affidavit must include "sufficient facts" to satisfy the issuing magistrate that "probable cause does in fact exist" to issue a warrant. *See id.* art. 18.01(b). We conclude that a magistrate does not violate this requirement by issuing a warrant based on facts showing a "fair probability" that (1) certain items will be found at the designated location and (2) the triggering condition will occur. *See Grubbs*, 547 U.S. at 96–97.

Next, Appellant argues the warrant is invalid as an anticipatory search warrant because it does not comply with the heightened requirements applicable to warrants for a certain type of item. *See* Tex. Code Crim. Proc. art. 18.01(c). Under article 18.02(a)(10), a search warrant may be issued to search for and seize "property or items, except the personal writings by the accused, constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense." *Id.* art. 18.02(a)(10). A warrant for items described by subsection (a)(10), known as an "evidentiary search warrant" or a "mere evidentiary search warrant," is subject to heightened requirements:

> A search warrant may not be issued under Article 18.02(a)(10) unless the sworn affidavit required by Subsection (b) sets forth sufficient facts to establish probable cause: (1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.

Id. art. 18.01(c). Appellant argues that the warrants here must be justified under article 18.02(a)(10) because the State agreed to strike from the first affidavit allegations satisfying article 18.02(a)(7). We disagree.

Under article 18.02(a)(7), a search warrant may be issued to search for and seize "a drug, controlled substance . . . or other controlled substance property, including an apparatus or paraphernalia kept, prepared, or manufactured in violation of the laws of this state." *Id.* art. 18.02(a)(7). The State agreed to strike the allegation that there was already a quantity of psilocybin on the property, but the allegations regarding the pending delivery of the packages remained. Those allegations are sufficient to justify issuing the warrant under article 18.02(a)(7). A warrant that authorizes a search for items described by article 18.02(a)(10) and items listed under another ground is not subject to article 18.01(c). *See Jennings v. State*, 531 S.W.3d 889, 893 (Tex. App.—Houston [14th Dist.] 2017, pet. ref'd) (concluding that warrant that authorizes search for both "mere evidence" and items listed under another ground for search and seizure, "is not a mere evidentiary search warrant and is not subject to the heightened requirements of 18.01(c)"); *Carmen v. State*, 358 S.W.3d 285, 298 (Tex. App.—Houston [1st Dist.] 2011, pet. ref'd) (same).

Next, appellant argues that the warrant is invalid because the triggering condition did not occur. He contends the State essentially admitted that this did not occur at the suppression hearing. Specifically, the prosecutor told the court that "it was Zachary Alfin that approached the UPS delivery truck and took custody of the two packages." He contends that this is insufficient to show the package was in fact delivered to the premises because there is no information regarding Zachary Alfin's connection with Thigh High Gardens. The only reference to Alfin in the record is from the statement of the prosecutor at the suppression hearing. The arguments of the parties "are not evidence." *See Cary v. State*, 507 S.W.3d 750, 755 (Tex. Crim. App. 2016). But even if we consider the prosecutor's statements, the record is sufficient to show that the packages were delivered to the property. The offense report reflected that

Detective Harris observed the UPS delivery truck enter the premises, saw an individual known from prior surveillance of the property approach the UPS delivery truck and take custody of the packages, and determined that the UPS tracking numbers of the two packages indicated that delivery had been made. Based on these facts, we conclude that the district court did not abuse its discretion in concluding the triggering condition occurred before the warrant was executed.

In his remaining issues, appellant argues that Detective Harris's affidavits fail to establish probable cause for either warrant. When we review a magistrate's decision to issue a warrant, we apply a highly deferential standard of review because of the constitutional preference for searches to be conducted pursuant to a warrant. *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). "Ultimately, the test is whether the affidavit, read in a commonsensical and realistic manner and afforded all reasonable inferences from the facts contained within, provided the magistrate with a 'substantial basis' for the issuance of a warrant." *Foreman*, 613 S.W.3d at 164 (quoting *McLain*, 337 S.W.3d at 271). Appellant argues that the first affidavit fails to establish probable cause that he mailed the packages from Oregon because anyone could have written his name and address on the shipping labels. However, the affidavit contained additional information linking appellant to the packages: the address on appellant's driver's license is the same as on the shipping labels, and Thigh High Gardens' website lists him as an employee. Considering all these facts together, we conclude that the magistrate had a substantial basis to determine that probable cause existed to issue the warrant. *See State v. Jordan*, 342 S.W.3d 565, 569 (Tex. Crim. App. 2011) (explaining that courts determine probable cause from "totality of the circumstances contained within the four corners of the affidavit").

Next, appellant argues that Detective Harris's second affidavit, concerning appellant's phone records, is improperly conclusory. Neither Texas nor federal law defines precisely what degree of probability suffices to establish probable cause, "but that probability cannot be based on mere conclusory statements of an affiant's belief." *Rodriguez*, 232 S.W.3d at 61. The affidavit must contain enough facts for the magistrate "to independently determine probable cause." *Id.*; *see also Elrod*, 538 S.W.3d at 558 ("A magistrate should not be a rubber stamp.").

The second affidavit consists of seven statements explaining Detective Harris' justification for seeking appellant's phone records for the relevant time:

1. On Friday, June 9, 2017, Affiant executed a court ordered search and arrest warrant at 2070 Lime Kiln Road in San Marcos, Hays County, Texas, after having conducted a controlled delivery of a distributable amount of psilocybin, a controlled substance listed under penalty group 2 of the Texas Health & Safety Code.

2. The parcels were shipped from Eugene, Oregon via UPS to the above mentioned address with the name "Silas Parker" as both the sender and the recipient, "care of" Scott Cove. The package was initially intercepted by Oregon State Police and determined to contain approximately 40 pounds of psilocybin.

3. Silas Parker (DOB: 08/04/83) was determined to have a TXDL with an address of 2070 Lime Kiln Road, San Marcos, Texas. Silas Parker was not on scene at the time of the search warrant; an associate of Parker stated he was out of town.

4. The above mentioned location is a business/farm known as Thigh High Gardens. The website for Thigh High Gardens (thighhighgardens.org) lists Silas Parker as the manager.

5. During execution of the search and arrest warrant, it was determined that Silas Parker resides at 2070 Lime Kiln Road, San Marcos, Texas, which is the same address listed on the two parcel[s]' shipping labels that contained the psilocybin; this [was] determined not only by Parker's TXDL but by the affirmative link(s) located within the residence.

6. The electronic customer data sought from Silas Parker's mobile cellular carrier would provide evidence that Silas Parker was in Oregon at the time of shipment of the approximately forty (40) pounds of psilocybin, which listed Silas Parker as the shipper and the receiver on the two parcel's shipping labels.

7. Affiant knows via training and experience that the data sought is held in electronic storage by the mobile cellular carrier.

Appellant argues that the affidavit is conclusory because Detective Harris failed to explain the source of his knowledge for these statements. For example, the affidavit is silent on how Detective Harris knew the Oregon State Police intercepted the packages and that the packages contained psilocybin, or how he knew the cellular provider would possess appellant's data.

However, the magistrate could reasonably infer this information from the facts presented. *See Foreman*, 613 S.W.3d at 164. Harris's statement that he executed a search warrant on 2070 Lime Kiln Road after conducting a controlled delivery of packages that had been seized by the Oregon State Police permits an inference that the police informed him about the content of the packages and their destination. The statement that the address on appellant's license was the same as the shipping packages permits a reasonable inference that Detective Harris viewed appellant's driver's license in the course of the investigation. And it was reasonable to infer that the cellular provider would possess appellant's electronic customer data. Electronic customer data consists of "data or records" in the "possession, care, custody, or control of a provider of an electronic communications service" and which contain, among other things, "information about a customer's use of the applicable service," "the content of a wire or electronic communication sent to or by a customer," and "any data stored with the applicable service provider by or on behalf of a customer." *See* Tex. Code Crim. Proc. art. 18B.001(7); *id*. art. 18.02(b)(2) (providing that "electronic customer data" has meaning assigned by article 18B.001). There being no dispute that Detective Harris sought information from the company that was appellant's cell phone provider at the relevant time, it was reasonable for the court to

infer that the company would possess this data. We conclude the second affidavit established probable cause.

We overrule appellant's issues on appeal.

CONCLUSION

We affirm the district court's judgment.

Edward Smith, Justice

Before Chief Justice Byrne and Justices Triana and Smith

Affirmed

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